Exhibit 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL KLEEBERG, et al.,

Plaintiffs,

v. 16 Civ. 9517 (LAK)

WENDY EBER, et al.,

Defendants. Conference

New York, N.Y.
January 26, 2023
4:09 p.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

APPEARANCES

BROOK & ASSOCIATES, PLLC
Attorneys for Plaintiffs
BY: BRIAN C. BROOK, ESQ.

FARRELL FRITZ P.C.
Attorneys for Defendants
BY: FRANK T. SANTORO, ESQ.
KEVIN P. MULRY, ESQ.

HERBERT LAW
Attorneys for Defendants
BY: JOHN S. HERBERT, ESQ.
(Present Via Speakerphone)

WOODS OVIATT GILMAN LLP
Attorneys for Canandaigua National Corporation
BY: DONALD W. O'BRIEN, JR., ESQ.
(Present Via Speakerphone)

(Case called)

THE DEPUTY CLERK: Counsel for plaintiff, are you ready?

MR. BROOK: Yes. Good afternoon, your Honor. Brian Brook for the plaintiffs.

THE DEPUTY CLERK: Counsel for defendant, are you ready?

MR. SANTORO: Yes. Good afternoon, your Honor. Frank Santoro, Farrell Fritz, PC, counsel for the Eber defendants.

THE COURT: Good afternoon.

MR. MULRY: And Kevin Mulry of Farrell Fritz, also for defendants. Good afternoon, your Honor.

THE COURT: Mr. Mulry.

THE DEPUTY CLERK: Counsel for defendant Canandaigua. Counsel, are you on the phone? Are you ready?

THE COURT: Apparently not.

THE DEPUTY CLERK: They were there. Shall I --

MR. O'BRIEN: Your Honor, this is Don O'Brien calling in. I'm representing Canandaigua National Bank.

THE COURT: And in your view, are they still in this case or not?

MR. O'BRIEN: Well, your Honor, my understanding is, from reviewing the various claims and counterclaims, there is relief that's being sought that could affect Canandaigua National Bank, particularly with respect to some further

proceedings in the surrogate court, and, of course, your Honor, we do have a settlement agreement with the plaintiff when we were let out of the case, based on their claims, and so we are in fact interested in the outcome with respect to that matter as well, which is reimbursement of attorney's fees.

THE COURT: Well, my question was actually a little different than whether you're interested. Are you a party to this case today?

MR. O'BRIEN: We still have a -- an interpleader claim which I believe has not been resolved, and so therefore, I believe we are, although every notice I get says that I've been terminated.

THE COURT: And you didn't show up at the trial.

MR. O'BRIEN: I did not, your Honor.

THE COURT: Okay. That has whatever effect it has, which I'm not going to decide now.

Now, Mr. Brook, I have your letter, I have Mr. Santoro's letter. Do you have any response to Mr. Santoro's letter?

MR. BROOK: I mean, a lot of the letter doesn't say all that much other than throwing out terms like Princess Lida and stuff like that. I just want to clarify what we're asking the Court to do. We're not asking the Court to step into the shoes of the missing surrogate. All we're asking --

THE COURT: Is there a missing surrogate?

MR. BROOK: From my understanding -- I'm not the estate lawyer, but the docket shows no acting surrogate was appointed even after the surrogate in June of last year referred the matter to the administrative judge for an assignment. So I spoke to my estate lawyers and they talked to someone and confirmed that no acting surrogate had yet been appointed.

THE COURT: But Mr. Santoro, on what basis do you say that there is or was an acting surrogate?

MR. SANTORO: Any application would require adjudication by an acting surrogate, in the event there was a recusal by the sitting surrogate, elected by the folks of Monroe County.

THE COURT: So you're saying that there's an acting surrogate not because one has been appointed but because in your view, somebody would have to be appointed if something was before the surrogate's court requiring decision; is that right?

MR. SANTORO: Not quite, your Honor. My understanding is that surrogate Ciaccio, if I'm pronouncing his name properly, is no longer recusing himself with respect to the estate of Lester Eber but during any period of time --

THE COURT: How do we know that?

MR. SANTORO: That's what I've been informed by estate counsel in Monroe County.

THE COURT: Is there anything on the record that he

recused himself?

MR. SANTORO: Yes, there is.

THE COURT: Is there anything on the record that says he unrecused himself?

MR. SANTORO: That was with respect to a proceeding that was brought for fees, but no, the answer is no.

THE COURT: So there is no acting surrogate at the moment. And there --

MR. SANTORO: Every county has an acting surrogate. Once an application is made in the surrogate's court, if the sitting surrogate has recused him- or herself, it's referred to the acting surrogate. That's my understanding of how it works.

THE COURT: And that's where, in the Surrogate's Court Procedure act or somewhere else?

MR. SANTORO: I think it's a function of the administrative judge in each county taking cases in the surrogate's court, whether they're administrative cases or actual litigations where they're contested matters, and once an application is made, if the surrogate has recused himself or herself, it is then referred to an acting surrogate.

THE COURT: Is there anything that's been referred to an acting surrogate?

MR. SANTORO: Not that I've seen, your Honor.

THE COURT: Because there's nothing pending, right?

MR. BROOK: Your Honor --

MR. SANTORO: Well, that's an interesting question. I mean, the administration of the estate of Lester Eber is ongoing and it's subject to the surrogate's court's jurisdiction, so any application that's made that requires adjudication must be made in the surrogate's court.

THE COURT: So I take it the answer is no.

MR. SANTORO: If --

THE COURT: You're telling me that if something happens, then something else happens, but nothing has happened yet, right?

MR. SANTORO: Nothing has happened that requires adjudication.

THE COURT: Okay. Thank you.

Back to you, Mr. Brook.

MR. BROOK: Yes. Just on that point, so there was a petition filed in early December for the payment of fees that was withdrawn on the last day of the year. And in the three weeks or so after that was filed, there was still no acting surrogate who had been appointed by the court, so I don't know what Mr. Santoro is referring to there. But it doesn't really matter, other than the fact that what's been going on there, or has been going on with the estate, sort of gives additional concern to my clients about the state of Eber Connecticut, because that's what we're really here about is the nominal defendant, Eber Connecticut, which is not a party to the

surrogate's court. So this has nothing to do with the jurisdictional limitations of this court, or whatever it is that they're referring to there. We are just asking for information to be disclosed pending a decision, because that asset is likely going to be the only asset left in Mr. Lester Eber's estate at the end of the day, so it's all the more important to preserve its value.

THE COURT: Have you asked the other side for the information you want?

MR. BROOK: Yes, your Honor, and we were getting information and regular updates I thought for the last year. We had, you know -- I think the bills that they submitted show that they billed over $50,000 in the first -- in December, January, February, after the trial and all the briefing was over, because we were talking so much, we were exchanging information, and we had an agreement that anything else happens, any employees give notice of termination or thinking about leaving or any suppliers dualing them -- that's always been one of the main points of concern because, you know, I've talked to the potential buyer Andy Eder's lawyers; that's a factor for them that would affect the price that they pay. They were supposed to share that, and we found out just right at the end of the last year, I believe it was, Mr. Kleeberg, who is in the industry, heard from someone, and then we confirmed with Andy Eder, who had heard this information as

well -- or his attorneys, rather -- that the second-largest supplier had dualed them months ago.

THE COURT: You wrote me a letter nine days ago saying you weren't getting information. Have you gotten it in the interim?

MR. BROOK: No, your Honor, because the information that we're aware of, we already got on our own. The issue here is, you know, if there's anything else that hasn't been disclosed and really going forward pending a decision, you know -- and in particular, the thing I didn't want to put in the letter, but it's our understanding and sort of from rumors and such -- which is apparently how this industry works -- that a number of senior Eber Connecticut -- or Slocum & Sons, as it's called -- employees are actively looking for other employment. It's our understanding that Wendy Eber long ago said that if and when my clients get control of the company, a lot of people are going to lose their jobs, and so, you know, I don't -- again, I didn't hear this myself. That's what the word on the street is; the sort of attitude of, if I can't have it, no one can. And that's what we're concerned about is, will it happen again. And it already did happen --

THE COURT: I suppose if she's done that, she's wide open to liability for another reason.

MR. BROOK: And the last thing we want to do, your Honor, is file another lawsuit against Wendy Eber.

But more importantly, you know, those employees are the key part of this company. The relationship that they have with suppliers are what makes sure that those suppliers continue to use Eber Connecticut as their exclusive distributor. So we got word at the end of last year, for example, that a key employee -- we didn't know who, Wendy wouldn't share the information, wouldn't let us talk to him, but -- had given notice. And essentially, you know, our hands were tied, based upon that information. We don't want that to happen going forward.

I mean, in December or January last year, whenever it was that we had heard that -- so I'm referring to December '21 or January '22 -- you know, we were expecting, you know, based upon what your Honor had told us, a decision any day, and we didn't want to bother this Court with something that --

THE COURT: I wish I could have given it to you.

MR. BROOK: But I think, you know, at this point we -- you know, we understand your Honor is extremely busy. We just want to make sure that however much longer it takes, that my clients can try to do something, if they can, to intercede in the event a key employee gives notice.

We've also talked about the possibility of having a, you know, a letter from my client to employees, just basically undoing whatever may have been said by Wendy Eber, reassuring employees their jobs are safe, we are not planning on having

anyone terminated, you know, just -- we want to be able to do something to avoid a potential destruction of the value of this company.

THE COURT: Mr. Santoro, what about it?

MR. SANTORO: First, your Honor, on the question of whether the plaintiffs asked the defendants for the information that's being requested, I have not spoken or heard from Mr. Brook since our last conference in September.

THE COURT: I read your letter.

MR. SANTORO: Okay. Before that, the idea that there was an agreement in place that we would provide some kind of information dates back to more than nine months ago, when the parties were still involved in settlement discussions, which have long ceased. That's the first thing. So if Mr. Brook had requested information rather than writing a letter to the Court, we would have been happy to have a conversation with him about the nature of the information that he's seeking.

THE COURT: Well, how about now?

MR. SANTORO: Well, how about now. We can start with CDI, which is this dualing that occurred. Mr. Brook just told you about the dualing of Eber Connecticut's second-largest supplier. What he didn't tell you is that CDI dualed every supplier, every distributor that they had in Connecticut. There is nothing about --

THE COURT: Did you tell him that?

MR. SANTORO: No, because he didn't ask me, your Honor.

THE COURT: You've had his letter for nine days. Why didn't you tell him?

MR. SANTORO: There's been no communication.

THE COURT: Why not? Why didn't you pick up the phone? I'll grant you, maybe he should have picked up the phone. Why can't you pick up the phone?

MR. SANTORO: Your Honor, because when we have provided information to Mr. Brook in the past, he has acted in a way, in terms of communicating with Eber Connecticut's competitors in Connecticut, that is irresponsible. So we are reticent to provide the kind of information that he's asking for. Nevertheless, we have in the past.

THE COURT: You know what it's beginning to sound like; it's beginning to sound like what you need is a receiver. And sooner rather than later. Doesn't it? If you guys can't play in the sandbox in a responsible way like two grown 6-year-olds, don't I have to get an adult in here?

MR. SANTORO: Your Honor, the business of Eber Connecticut under Wendy Eber's administration, under her stewardship, has performed exceptionally well. The idea that we're going to replace Wendy Eber with a receiver --

THE COURT: If you don't yet know that your client is in the middle of the Great Lakes on very thin ice, you haven't

been paying attention, because I have a very negative view of her credibility and her even-handed administration of the assets that have been subject to her control or influence. And I'm the finder of fact. Getting the message?

MR. SANTORO: Yes, your Honor.

THE COURT: Good. So maybe you'll be a little bit more forthcoming and maybe the two of you can do what you should have done -- what is this, we're in 2023? -- seven years ago when this case was filed. And I don't remember who the lawyers were then, but I remember talking to both of them at the beginning of it and telling them that from my days in practice, there is nothing worse than a family litigation over a business, because at the end, everybody loses except the lawyers, and I urged them to sit down and settle and offered to assist personally in doing that if they were interested, and the answer I got back was neither side was interested. Get with it.

Now I expect not to hear about this fight over information again. In the meantime, I'm prepared to rule on two of the issues that are pending before me.

Very late in the day, memory serves after the trial was over, the defendants suddenly asserted the contention that under something called the Princess Lida doctrine, this Court, where we have been litigating for the last seven years, didn't have jurisdiction and somehow there was a new *res judicata*

argument. I'm going to assume for purposes of my remarks that a reader of them will be up to date on what has happened in the Surrogate's and Supreme Court in Monroe County. I don't think that the historical facts are in any way disputed, and I'm not going to take the time to summarize them.

But let me start with the Princess Lida doctrine, which the defendants claim ousts this Court of federal subject matter jurisdiction. The Princess Lida doctrine prevents federal courts from adjudicating claims to a res that is currently under the control of another court. It applies when there's prior pending litigation and two conditions are met: first, both actions must be *in rem* or *quasi in rem* in nature; second, the relief sought would require the second court to exercise control over property already under the jurisdiction of the first court.

Now the first thing to be noted is that in the Second Circuit, which is where we are located, the Princess Lida doctrine has nothing to do with subject matter jurisdiction. The Second Circuit has said that, among other places, in the *Carvel v. The Thomas and Agnes Carvel Foundation* case, 188 Fed.3d 83, it has to do with abstention, which is a discretionary doctrine. So the issues for me to determine are whether the prerequisites to the Princess Lida doctrine are met in this case and, if they are, whether I am obliged by principles of abstention to defer to the courts up in Western

New York.

First of all, the Princess Lida doctrine doesn't apply at all in this case. The key issues in this determination are timing and whether both actions are *in rem* or *quasi in rem* in nature. The timing of the filing of this action precludes any need or any justification for Princess Lida abstention. The purpose of the Princess Lida doctrine is to protect one court's jurisdiction over a res property from another court's subsequent attempt to exercise jurisdiction over the same res. The doctrine cautions courts to abstain to avoid contradictory determinations of property rights.

The Surrogate's Court was not exercising jurisdiction over the trust in this case when this action was filed. The defendants have contended, first of all, that the probate of Allen Eber's will, 53 years ago, conferred continuing jurisdiction over the res on the Surrogate's Court in Monroe County. But an exercise of jurisdiction in the relevant sense would require that there be pending in the first court, at the time of the filing of the second action, some active dispute, at a minimum. The mere existence of power to supervise the administration of a trust doesn't mean that jurisdiction in fact is being exercised. There have to be affirmative steps by the trustee or the court for jurisdiction to attach to the trust corpus. There were no actions open in the Surrogate's Court, and there were no such actions at the time this case was

filed. Indeed, by the time this case was filed, the Surrogate's Court had terminated the testamentary trust.

The defendants cite an unreported and nonprecedential case, *Mercer v. Bank of N.Y. Mellon*, 609 Fed. App'x 677, for the proposition that the Surrogate's Court had continuing jurisdiction over the trust. *Mercer* expressly did not propound a view on the minimum amount of activity that would have been sufficient to give the Surrogate's Court supervisory control over the trust. In *Mercer*, there was a trial pending in the Surrogate's Court. When the federal case was filed here, there were no proceedings in the Surrogate's Court.

Secondly, I don't need to determine whether any of the claims in this case were *in rem*, *quasi in rem*, or *in personam*, because at least some of the plaintiff's claims here are *in personam*, and they would not be foreclosed even if the Princess Lida abstention were appropriate with respect to others. And not all claims relating to trust administration and asset distribution are *in rem* or *quasi in rem*. *In rem* jurisdiction involves cases where property actually has been seized under judicial process before the second suit is instituted. *Quasi in rem* claims are brought to marshal assets, administer trusts, or liquidate estates, and if suits with similar nature were to give effect to its jurisdiction, the court must control the property. Claims seeking to contest management or to effect a distribution of property may be *in rem* or *quasi in rem*, but

those merely seeking an *in personam* judgment declaring the plaintiff entitled to receive from the fiduciary an interest in a trust estate are not.

In *Lefkowitz v. Bank of New York*, which is at 528 Fed.3d, the Second Circuit held that claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent misrepresentation, and fraudulent concealment are *in personam* because for each of those claims, the plaintiff seeks damages from the defendants personally rather than assets or distributions from an estate. Moreover, in addressing those claims, the federal court will not be asserting control over any res in the custody of a state court. In this case, the plaintiffs do not require this Court to take control of any res property. Even if there did, there would be an abundance of *in personam* claims.

In any event, the defendants' arguments that all of plaintiffs' claims should be dismissed under the Princess Lida doctrine because the claims all derive from their equitable interest in the trust res as trust beneficiaries is absolutely clearly wrong.

Plaintiffs also bring claims derivatively on behalf of various Eber corporations. In any event, defendants have forfeited any claim to abstention by actively participating in this suit for years without raising the Princess Lida argument until after the conclusion of the trial. As I've discussed

already, the Princess Lida doctrine is a prudential rule of abstention. Claims to abstention, even mandatory abstention, can be waived. Defendants failed to plead or move to dismiss on the basis of the Princess Lida abstention doctrine at the right time, and they can't avail themselves of the Court's discretionary power to abstain at this late date.

There is also an argument that the proceedings that led to the Surrogate's Court 2017 order, which, if memory serves, as was the order to allow the Canandaigua National Bank to be done with its service as a trustee, placed all issues and claims pertaining to the trust before the Surrogate's Court and that this Court therefore is precluded from hearing any of plaintiffs' claims as a matter of *res judicata*. That argument is dead wrong for two reasons:

First, *res judicata* is an affirmative defense that normally must be pleaded in a timely manner or it's waived. Contrary to their assertion in the post-trial briefs, the defendants did not plead *res judicata* on the basis of the 2017 Surrogate's Court accounting order in their amended answer. The reference there to *res judicata* pertained only to the Monroe County Supreme Court decision in 2012 regarding the commercial reasonableness of Alex Bay's foreclosure on Eber Metro, which touched only on one of the many issues addressed at trial. Any claim the defendants might have made under *res judicata*, any other claims, therefore, are gone. They were

history.

Even if the defendants hadn't waived the claim, the resolution of the Surrogate's Court accounting proceeding would not preclude this Court's adjudication of the claims at issue here, and the rationale is very similar to my views on the Princess Lida doctrine. *Res judicata* bars subsequent claims where three things are true -- there's a previous adjudication on the merits; the previous action involved a party against whom *res judicata* is invoked, or someone in privity with that party; and the claims involved were or could have been raised in the previous action. The claims before me, at least many of them, do not concern the trust res, its management, or the distribution of shares. Instead, to the extent plaintiffs' claims concern the trust, they arise from breaches of fiduciary duty and other *in personam* theories. As the accounting order is not a previous adjudication on the merits, there's no privity between the plaintiffs and CNB, which sought the 2012 accounting, and those claims could not have been raised in the previous action. The basic requirements of *res judicata* have not been satisfied.

Now I will possibly include a further discussion of the baselessness of the jurisdictional and *res judicata* claims when I issue a final decision here, but I may not. My remarks here are I think reasonably comprehensive on that point, and I'll just see how much time I have and whether I think it

worthwhile to provide all the citations and so on that a full-blown, for-publication opinion would include. But I consider those arguments as very belated, insufficient afterthoughts, after a trial in which the defendants saw which way the wind was blowing, and they're just without merit.

So now move along, please, folks, in the direction that is in all your interests, and I will move along as time permits, with a view toward trying to reach a final conclusion, in fully written form.

Anything else, folks?

MR. BROOK: Not from me, your Honor. The only thing I would just say, so that your Honor's expectations are clear -- I mentioned this in the letter last September -- is, this case is incredibly hard to settle because we can't just do it for money. We're talking about a company here. And so the challenge is, you know, in particular things like what kind of release can we get, can we see any of the books and records before we grant a full general release to the defendant, and, you know, the insistence on a full general release, essentially buying a company for the claims, is something that is very difficult. I mean, my client Dan Kleeberg's son Justin Kleeberg here, he's the head of M&A at the investment banking division for a bank here in New York. He's one who would -- as I tell my clients again and again, you cannot essentially take control of a company and have no recourse if she's embezzled

$5 million or something like that. So that's -- the absence of being able to just pay cash is, in my view, an insurmountable hurdle, but I will go back to it and see if we can maybe get them to reconsider.

THE COURT: Well, look, more complicated transactions than this have been done, and if Mr. Kleeberg is what you say he is -- I have no reason to doubt it -- he's a person who understands. Making deals is hard, and if you want a mediator here, I'll appoint one. Or you can go back to Judge Parker. But if you would prefer somebody else, I have a candidate. Not that you have to take my candidate. You can find your own. There are all sorts of possibilities.

MR. BROOK: I'll speak with my clients, but when I last did, they are of the view that we've exhausted all of our efforts in this -- and just to also correct your Honor's understanding, when we got assigned to this case -- I was here from the beginning -- unlike these guys, we never told your Honor we wouldn't talk about it. Your Honor had the dog bite incident and we never actually met, so we got quickly assigned over to Judge Parker and we did several settlement conferences with her over the years.

THE COURT: Let's not have another dog bite incident to try to promote you to settle. Now obviously you have a right to a decision, and I will give you a decision. And sometimes I can do it very quickly and sometimes it's harder.

It's not an excuse, but the volume of evidence that was dumped in -- and I don't use that pejoratively, it was nonjury and I invited it in a sense, by doing it the way we did it -- is huge, and it takes a lot of uninterrupted time to get my head around all of it, and every time I get distracted on some other emergency for a week, I've taken two steps forward and I take one and a half back. And I acknowledge that it would have been better if I had gotten this done a long time ago. I'm furious with myself over it. But that's not getting it done. So I'm working away.

MR. BROOK: Thank you, your Honor. And certainly if there's anything the parties can do to assist your Honor, we're open to that. And my clients are even open to -- I know this is a very unusual thing I'm about to say. If your Honor has any particular issues that are creating trouble, we would consider dropping --

THE COURT: It's not the law that's giving me any problems here. I can handle the law of the state of New York.

MR. BROOK: All right.

THE COURT: Okay. Mr. Santoro, anything else?

MR. SANTORO: Nothing, your Honor. Thank you.

THE COURT: Okay. Thank you.

MR. BROOK: Thank you.

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